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NO. ~~SR~~ 47

In The Supreme Court Of The United States

OCTOBER TERM, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

THE WARREN COMPANY, INCORPORATED

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE STATUTE INVOLVED

Not only are relevant the provisions of the section of the Statute cited by the Solicitor General, but very revelant are the provisions of Sec. 9(a) (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC 151, et seq.), set forth as follows:

"Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; . . .

(c). (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i)

wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9 (a), or (ii) *assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Sec. 9 (a);* or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a); a

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice.* Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. . . .

(3) No election shall be directed in any bargaining unit or any subdivision within which, *in the preceding twelve month period, a valid election shall have been held . . .*"

STATEMENT OF THE CASE

The statement of the case submitted by the Solicitor General is substantially correct. Respondent would clarify certain portions thereof.

There has never been at any time a Board conducted election for certification or decertification of the Union at Respondent's plant.

On petition to adjudicate the Company in civil contempt for refusing to comply with the decree, the Company not only reiterated the defense of the Union's loss of a majority, but asserted that it had in all good faith complied with all of the provisions of the decree in that it had posted notices, had reinstated certain employees, had paid back wages to those certain employees, had ceased and desisted from the practices prohibited by the decree, and had sought, in all good faith, through all legal processes the determination of the majority status of the Union. These requests for a fair determination of this status through the facilities of a Board-conducted and supervised election were flatly denied by the Board.

On November 23, 1948 the Union filed with the Board a Petition for Certification as the Bargaining Representative of Respondent's employees (appendix to Petitioner's Brief 171). An agreement for a consent election was entered into between the Respondent and the Union on January 5, 1949 (appendix to Petitioner's Brief, 87). On January 8, 1949 the Union withdrew its consent (app. to Petitioner's Brief, 88) *and the election was never held.* Subsequently, unfair practice charges were filed by the Union, and, after a hearing thereon the Board ordered the Company to recognize the Union as the Bargaining Agent *on the basis of card designations.* Respondent was adjudged by the Board as guilty of certain unfair practices, including discriminatory discharges and failure to bargain, and the Court entered its Enforcement Order. Respondent had complied with the Court's decree by the posting of notices, the reinstatement of certain designated employees, the payment to them of back wages, and had met for bargaining as described in the Petition to this Court. A petition signed by five out of six employees

involved informed Respondent that it was the desire of these employees that the Union no longer be recognized as their bargaining agent. Respondent petitioned the Board to hold an election to determine the status. The Board refused. Respondent declined to bargain further. The Board petitioned the Fifth Circuit Court of Appeals to find Respondent in Contempt, principally on the ground that it had failed to bargain. The Court absolved Respondent and dismissed the Petition.

REASONS FOR DENYING THE WRIT

1. The Court did not disregard well-settled principles of substantive law.

No election had ever been held. Recognition was ordered by the Board on the basis of card designations. The rule requiring recognition of the Union for a twelve month period cited by the Board, applies under the statute only where "a valid election shall have been held."

In the recent case of BROOKS VS. NATIONAL LABOR RELATIONS BOARD, decided December 6, 1954, this Court upheld the Board's formula: "A certification, *if based on a Board conducted election*, must be honored for a reasonable period, ordinarily 'one year' in the absence of unusual circumstances." And in the footnote in this case the Court says "Both before and after the Taft-Hartley Act, the Board and the Courts did not apply the rule to a collective bargaining relationship established *other than as the result of a certification election*, citing Joe Heaun, 66 N.L.R.B. 1276, (card check); Labor Board vs. Mayer, 196 Fed. (2d) 286 (card check); Squirrel Brand Co., 104 N.L.R.B. 289, (order to bargain)." In the Mayer case, cited by this Court, the Board refused an election, certified the Union on the basis of a card check,

and ordered bargaining. The Court denied enforcement.

2. Not being based on the same statute, the decision below is not in conflict with the ruling of the Court of Appeals for the Fourth Circuit in Great Southern Trucking Co. vs. National Labor Relations Board, 139 Fed. (2d) 984, certiorari denied, 322 U.S. 729. The Trucking Co. case based on the 1935 Statute was decided on January 10, 1944, and certiorari denied by this Court on April 24, 1944, three years before the passage of the "Labor Management Relations Act of 1947," which incorporated the above cited amendments providing the twelve month period between elections, and providing certification and decertification elections. Decertification elections were permitted where employees asserted the bargaining agent was no longer their representative. (Secs. 9a and c).

Upon the Board's refusal to hold an election, in accordance with the Act, to determine the majority status, it became proper for the Court to inquire whether the Board's action had been arbitrary and capricious, and to deny the contempt petition on the facts presented.

3. The Circuit Court did not abuse its discretion in dismissing the Petition for Contempt.

It is recognized that a Court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt. But the action of the lower Court as to matters in its judicial discretion will not be disturbed unless there is a clear and gross abuse thereof. (2 Amer. Juris. p. 917).

This Court has consistently refused to review the judgments of lower Courts on petitions for contempt arising from alleged disobedience of orders of enforce-

ment under the Labor Management Relations Act of 1947 and its predecessor, the Wagner Act.

West Texas Utilities Co. vs. N.L.R.B., 206 Fed. (2d) 442-449, Cert. denied 346 U.S. 885.

N.L.R.B. vs. Express Publishing Co. (5th Circ.), Not in contempt. 128 Fed. (2d) 690, Cert. denied —317 U.S. 676.

Great Southern Trucking Co. vs. N.L.R.B., 139 Fed. (2d) 984; Cert. denied 322 U.S. 729.

Reed & Prince Manufacturing Co. vs. National Labor Relations Board, (not in contempt), 205 Fed. (2d) 131—1st Circ.—Cert. denied, 346 U.S. 887.

While the right of review is recognized, it is said that "it belongs exclusively to the Court offended to judge of contempt; and no other Court or Judge can or ought to undertake, in a collateral way, to question or review an adjudication of contempt made by another competent jurisdiction." (Anderson vs. Dunn 6 Wheat (U.S.) 204, 5 L.Ed. 242.

Contempt can be found only if the Circuit Court was offended by the acts of Respondent. Because of the circumstances that Court did not feel offended, but on the other hand felt that it "would stultify itself, its decree and do violence to the Act if it ordered the employer to force upon its employees as bargaining agent a Union not of their own choosing merely because some six years before the Board had ordered the employer to recognize it as bargaining agent for its then employees."

It was never the intent of Congress to force an employer to bargain with a Union which is not the choice of the employees, has never been certified as the result

of a Board conducted election, and has been repudiated by the employees. Due processes prescribed by the Congress for the fair determination of the bargaining agent have been denied the employees and the employer. The agency should exist. To punish a Respondent for failure to bargain with a Union which is not the agent would be a mockery of justice. The Circuit Court did not abuse its discretion.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted.

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